HO MIN HAO & ANOR v. HO YEE CHIN & ANOR

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL SUIT NO: 22NCVC-102-09-2015]
29 FEBRUARY 2016

TRUSTS: *Illegality – Recovery of trust property – Constructive trust – Whether existed – Whether trust created for benefit of trustees – Whether trust created to defeat creditors in event of bankruptcy – Whether transaction tainted with illegality – Whether trust could only be created by person who owned trust property – Whether trust registered – Whether there was certainty as to identity of beneficiaries – Whether plaintiffs had locus standi to institute claim – Whether claim barred by doctrine of laches – Tinker v. Tinker – Whether applicable*

The plaintiffs' claim was for a declaration that certain properties in the names of the defendants, *ie,* the shares in a company known as Sri Magjuta Sdn Bhd ('shares') and a house ('Damansara house'), were held in trust for them. Sometime in 1996, the late Ho An Kee ('HAK'), who was the patriarch of the family, incorporated Sri Magjuta Sdn Bhd after Hup Soon Enterprise Sdn Bhd, another company owned by him, was on the verge of being wound up. Ho Yee Chee ('HYC') and the first defendant were HAK's children. The plaintiffs were HYC's sons. The second defendant was the first defendant's husband. HYC's wife, the first defendant and two other daughters became the shareholders and the first directors of the company. Between then and the filing of the present action, the shares of Sri Magjuta Sdn Bhd changed hands several times. The plaintiffs and the defendants were the present shareholders in Sri Magjuta Sdn Bhd. In 2000, HAK, his wife and HYC were all adjudicated as bankrupts. Disputes arose in relation to the business when HAK passed away on 15 August 2013. The defendants then filed an action under s. 167(6) of the Companies Act 1965 for an order to inspect the books of Sri Magjuta Sdn Bhd ('the first action'). The plaintiffs opposed the said application and filed affidavits alleging that the defendants had no right to do so as they were only nominal directors and held the shares in trust for them. As a result, the plaintiffs instituted the present claim to recover the shares and the Damansara house. The plaintiffs alleged, *inter alia,* that (i) their claim was based on constructive trust; and (ii) the defendants held the legal title of the Damansara house as bare trustees for them. Their claim was premised on the allegation that HAK paid RM500,000 and repurchased the house from the defendants in 2012 for their benefit. However, the defendants filed an application under O. 18 r. 19(1) of the Rules of Court 2012 to strike out the plaintiffs' claim on the argument that the claim was unsustainable. It was alleged, *inter alia,* that (a) the trust was unenforceable since HAK created it for an illegal purpose, namely, to defeat his creditors in the event of bankruptcy; (b) the alleged trust was void as there was no certainty as to who were the trust beneficiaries; (c) the plaintiffs had no *locus standi* to bring this

A action; and (d) the claim was barred by the doctrine of laches. The defendants also argued that it was incredible for the plaintiffs to contend that the Damansara house was held on trust by the defendants since HAK was an undischarged bankrupt when the full purchase price was allegedly paid in 2012. Further, the defendants also contended that the plaintiffs had not
B asserted title to the shares and the Damansara house in the period from which the first defendant became a shareholder and director of Sri Magjuta Sdn Bhd in 1996 and were not entitled to do so now as their claim was barred by laches.

Held (allowing defendants' application with costs):

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(1) A constructive trust arises by operation of law regardless of the intention of the parties. It arises whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another. On the facts, the plaintiffs alleged that their claim was based on constructive
D trust. However, the other paragraphs in the plaintiffs' statement of claim and the affidavits demonstrates that this was not so. On the contrary, it was patently clear that their claim was based on express trust that was created by HAK for the benefit of the plaintiffs. (paras 15 & 16)

E **(2)** Where a transaction which on the face of it is lawful and entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality. It will be unenforceable where a claim is brought in reliance of this illegality. On the facts, there was clear admission in the statement of claim and the statements affirmed by the plaintiffs in this action and the first action that the trust created by HAK,
F by making the defendants shareholders, was to ensure that the shares were put beyond the reach of his creditors in the event of his bankruptcy. This was a transaction where on the face of it was lawful but was entered into for an unlawful purpose. The court must not allow itself to be used by bankrupts or those facing bankruptcy to avoid the
G effects or consequences of bankruptcy by transferring their property into the names of close relations in circumstances where it was apparent that the recipient was a bare trustee. (paras 19 & 20)

(3) The plaintiffs could not take the position that HAK registered the shares in the defendants' names as bare trustees as he was facing imminent
H bankruptcy. A transaction is either genuine or a sham. It would not make sense if a transaction can be a sham for one purpose but not for another. Hence, the trust created by HAK could not be genuine as between him and the official assignee, whilst at the same time a sham as between him and the defendants (*Tinker v. Tinker;* refd). (paras 21 &
I 22)

(4) Only a person who owns a property can create a trust for the benefit of others by appointing a trustee. On the facts, the plaintiffs admitted that HAK never owned any shares in Sri Magjuta Sdn Bhd. As such, HAK was not in a position to create a trust in respect of the shares as he was not the owner of the shares (*Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor;* refd). (paras 24-26)

(5) A bankrupt cannot acquire properties. If indeed HAK had purchased the Damansara house from the defendants, he could not assert ownership over the property as he was a bankrupt at the material time. This effectively demolishes the plaintiffs' claim for the Damansara house. Further, the failure to register the trust was another reason why the plaintiff's claim was bound to fail. The plaintiffs' claim that there existed a trust failed on the ground of illegality. (paras 29-31)

(6) The creation of a trust requires three certainties, *ie,* intention, subject matter and object in order to be completely constituted. In the absence of any of these elements, it becomes an incompletely constituted trust and may not be enforceable. On the facts, the plaintiffs' claim for the existence of a trust was unenforceable since it was unclear as to who were the intended trust beneficiaries. The averments made were contradictory, confusing and unclear as to the identity of the trust beneficiaries. It was consequently difficult to ascertain which of these versions given by the plaintiffs represented the truth. No explanation was given for the different versions stated in the affidavits. The plaintiffs' different version also demonstrates that there was no certainty of objects. (paras 34 & 35)

(7) No explanation was given by the plaintiffs as to why HYC was not added as a party to this action. The second plaintiff's affidavit showed that the trust was created by HAK for the benefit of HYC. Therefore, HYC was the proper plaintiff with the requisite *locus* to bring this action. Further, HYC was still alive. In light of this, the plaintiffs had no *locus* to prosecute this claim. (paras 37-39)

(8) The defence of laches consists of a substantial lapse of time coupled with the existence of circumstances which makes it inequitable to enforce the claim. Mere delay itself cannot constitute laches. The doctrine of laches only applies to equitable claims, such as restitution, where no period of limitation is provided. The present claim was not an equitable claim but a claim to recover trust property. As such, the defendants' contention that the claim should be struck out by reason of laches failed. (paras 42-45)

Case(s) referred to:

Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals [2014] 3 CLJ 1 FC ***(refd)***

Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors [2013] 5 CLJ 949 FC ***(refd)***

Hasmah Abdul Rahman v. Kenny Chua Kien Lam [2006] 2 CLJ 1029 CA ***(refd)***

Holman v. Johnson (1775) 1 Cowp 341 ***(refd)***

Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock [2005] 3 CLJ 188 CA ***(refd)***

Lindsay Petroleum Co v. Hurd (1874) LR 5 PC 221 ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***

Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750 CA ***(refd)***

Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

See Hong Chen & Sons Sdn Bhd & Ors v. Datuk M Kayveas (Sebagai Pegawai Awam Parti Progresif Penduduk Malaysia Baru PPP) [2011] 1 LNS 1732 CA ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC ***(refd)***

Tinker v. Tinker [1970] 2 WLR 331 ***(refd)***

Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 167(6)

Limitation Act 1953, s. 22(1)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

For the plaintiffs - Peter-Douglas Ling; M/s Peter Ling & Co

For the defendants - Justin TY Voon (Kho Zhen Qi with him); M/s Justin Voon Chooi & Wing

Reported by Kumitha Abd Majid

JUDGMENT

SM Komathy JC:

The Application

[1] This is an application by the defendants to strike out the plaintiffs' claim under limbs (a) or (b) or (d) of O. 18 r. 19(1) of the Rules of Court 2012 and/or the inherent jurisdiction of the court. The plaintiffs' claim is for a declaration that certain properties in the first and second defendant's names were held in trust for them. The properties were:

(i) shares in a company called Sri Magjuta Sdn Bhd ("shares"); and

(ii) a house held under HS(D) 183963 Lot PT 6817, Mukim Sungai Buloh, Daerah Petaling, Selangor ("Damansara house").

[2] The application was strenuously objected to by the plaintiffs on the ground that the claim ought properly to be the subject of evidence and submission at the trial and cannot be resolved summarily. After these introductory remarks, it is now time to turn to the facts.

Factual Summary

[3] The undisputed affidavit evidence is that the late Ho An Kee @ Ho Fong Shun ("HAK") was the patriarch of the family. Ho Yee Chee ("HYC") and the first defendant are two of his children. The first and second plaintiffs are HYC's sons and the nephews. The second defendant is the first defendant's husband.

[4] Sometime in 1996, HAK incorporated Sri Magjuta as his other company, Hup Soon Enterprise Sdn Bhd was facing financial constraints and was on the verge of being wound up. HYC's wife, the first defendant and two other daughters became the shareholders and the first directors of the company. Between then and the filing of the present action, the shares of Sri Magjuta changed hands several times.

[5] The plaintiffs and the defendants are the present shareholders in Sri Magjuta, each plaintiff holding 212,500 shares and the first defendant and second defendants holding 305,000 and 270,000 shares, respectively. The present directors of Sri Magjuta are the plaintiffs, the first defendant and her sister. The second defendant is an alternative director.

[6] HAK and his wife Chin Joon Moy ("CJM") and HYC were all adjudicated bankrupts on 21 December 2000, 23 November 2000 and 24 October 2000, respectively.

[7] A dispute over the business arose when HAK passed away on 15 August 2013. This resulted in the defendants filing an originating summons ("the first action") under s. 167(6) of the Companies Act 1965 for an order to inspect the books of Sri Magjuta. The two plaintiffs opposed the said application and filed affidavits alleging that the defendants had no right to do so as they were only nominal directors and held the shares in trust for them. They then instituted the present claim against the defendants to recover the shares and the Damansara Jaya house.

Principles Governing Striking Out

[8] It is trite that O. 18 r. 19(1) of the Rules of Court 2012 is designed to deal with cases that are not fit for trial at all. Order 18 r. 19(1) empowers the court to, *inter alia*, strike out any pleading which discloses no reasonable cause of action or defence. The standard which must be satisfied before the court can exercise this power is clearly set out in the two leading cases of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 and *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16,

A where it was held that the power should be exercised only in cases where a claim or defence is so obviously untenable that it cannot possibly succeed and manifestly groundless.

Grounds Relied On To Strike Out Claim

B **[9]** The defendants contended that the claim was unsustainable on these grounds. First, the alleged trust was unenforceable as it was created by HAK for an illegal purpose, namely to defeat his creditors in the event of bankruptcy; secondly, the alleged trust was void as there was no certainty as to who were the trust beneficiaries; thirdly, the plaintiffs had no *locus standi* C to bring this action, and lastly, the claim was barred by the doctrine of laches.

[10] I propose to deal with these matters in turn.

Ground 1: Illegality

(a) Shares

D **[11]** The defendants first ground for striking out the plaintiffs' claim in relation to the shares was on the basis that the claim was based on illegality. The statement of claim and the affidavit affirmed on 24 July 2015 by the second plaintiff in the first action (hereinafter referred to as "the first affidavit") indicated that the trust was created by HAK in fear of his imminent E bankruptcy. In other words created by HAK to defeat his creditors and was thus unenforceable.

[12] In this connection, reference was made by Mr Justin HK Voon, counsel for the defendants, to paras. 8, 9 and 13 of the statement of claim and paras. 9, 12, 14 of the first affidavit. These were in these terms:

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(i) the statement of claim:

> Paragraph 8:
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> Disebabkan Hup Soon di ambang digulungkan dan HAK, CJM dan HYC pula di ambang dijadikan bankrap semasa Sri Magjuta G diperbadankan dalam tahun 1996, HAK telah menggunakan dan/ atau meminjam nama 3 orang anak perempuannya iaitu, Ho Yee Tieng, defendan pertama (He Yee Chin) dan Ho Yee Boon serta nama menantu perempuannya Wong Chow Lan (iaitu isteri HYC) untuk didaftarkan sebagai pemegang-pemegang saham dan juga memegang jawatan pengarah dalam Sri Magjuta.
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> Paragraph 9:
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> Pada setiap masa material, ia adalah dalam pengetahuan umum ("common knowledge") bahawa pegangan saham dan jawatan pengarah di Sri Magjuta yang dipegang oleh Ho Yee Tieng, Defendan Pertama, Defendan Ke-2, Ho Yee Boon dan Wong I Chow Lan adalah dalam nama sahaja dan bahawa mereka tidak mempunyai sebarang kepentingan dalam saham-saham yang dipegang dan/atau kuasa dalam jawatan pengarah mereka.

Paragraph 13:

Adalah niat dan hasrat HAK supaya semua saham Sri Magjuta akhirnya dimiliki oleh plaintif-plaintif yang merupakan cucu-cucu lelakinya daripada HYC, iaitu anak lelaki sulung HAK. Yakni, defendan pertama dan defendan kedua memegang saham-saham Sri Magjuta sebagai pemegang amanah konstruktif ("constructive trustee") dan/atau, dalam apa jua keadaan, dalam pegangan amanah ("in trust") bagi manfaat plaintif pertama dan plaintif kedua.

(ii) the first affidavit:

Paragraph 9:

Ia adalah sentiasa niat HAK dan CJM bahawa defendan ketiga akan dikendalikan, diuruskan dan dijalankan untuk manfaat HAK dan CJM serta ibu bapa kami iaitu HYC dan WCL, dan bahawa perniagaan dalam defendan ketiga akan diberikan oleh atau diturunkan dari HAK kepada HYC dan kemudian kepada defendan pertama dan saya.

Paragraph 12:

Pendek kata, makcik-makcik kami termasuk plaintif sejak 1996, serta suami plaintif Wan Kong Hon ("WKH") sejak pada atau lebih kurang April 1999, meminjam nama-nama mereka untuk digunapakaikan sebagai pemegang saham dan /atau pengarah defendan ketiga atas permintaan dan arahan HAK dan pegangan saham dan posisi pengarah tersebut adalah untuk manfaat HAK, HYC dan/atau defendan pertama dan saya.

Paragraph 14:

Datuk kami HAK dan juga nenek kami CJM berniat untuk ketiga-tiga makcik kami termasuk plaintif dan WKH memegang saham-saham dalam apa jua jumlah dalam defendan ketiga dan/atau jawatan "pengarah" bagi manfaat datuk dan nenek kami serta ayah kami. Pada setiap masa material, ketiga-tiga makcik kami termasuk plaintif tahu mengenai yang sama.

Paragraph 30:

Sebab utama saham-saham dalam defendan ketiga tidak dapat dipegang oleh datuk, nenek, ayah dan ibu kami adalah kerana mereka semua telah diperintahkan bankrap. Yakni, HAK telah memastikan bahawa saham-saham defendan ketiga dikekalkan dalam pegangan keluarga supaya akhirnya akan diwariskan kepada defendan pertama dan saya.

[13] In responding to the above contention, Mr Peter-Douglas Ling, counsel for the plaintiffs disputed that the plaintiffs claim was founded on illegality. He argued that the defendants' contention of illegality was fundamentally flawed on two grounds. First, to sustain the allegation of illegality, it was incumbent on the defendants to show there was a

A contravention of the Bankruptcy Act 1967 by HAK in making the defendants shareholders of his company, Sri Magjuta. It was ludicrous for the defendants to harp on the issue of illegality without identifying the provision of the Bankruptcy Act that was breached by HAK so as to render the trust illegal.

[14] Alternatively, he contended there was no factual basis to allege
B illegality as the evidence showed that HAK had never held any of the shares of Sri Magjuta. He contended that in order for the defendants argument to succeed it was essential that the shares in Sri Magjuta were registered in the name of HAK and that he then transferred his shares to others with a view of defeating his creditors in bankruptcy, that would amount to a breach of
C the Bankruptcy Act 1967 and seen as an act of defrauding the creditors.

[15] Before I deal with the rival submissions of the parties, it is desirable to make an observation about the plaintiffs' pleaded cause of action. Paragraph 13 of the statement of claim alleges that the claim is based on constructive trust. However, the other paragraphs in the statement of claim
D and the affidavits filed by the plaintiffs in the first and present action demonstrate that this is not so. On the contrary, it is patently clear that their claim is based on express trust that HAK created for the benefit of the plaintiffs.

[16] It bears mention that a constructive trust arises by operation of law
E regardless of the intention of the parties. A constructive trust arises whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another. In *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd & Ors* [2013] 5 CLJ 949, the Federal Court elucidated as follows:

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> It may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary, and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial
G interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence.

See also *Takako Sakao v. Ng Pek Yuen & Anor (No 2)* [2010] 1 CLJ 419; [2010] 2 MLJ 181 and *CIMB Bank Bhd v. Maybank Trustees Bhd & Other Appeals*
H [2014] 3 CLJ 1; [2014] 3 MLJ 169.

[17] I will next consider the legal principles that apply to illegal contracts. The judgment of the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619, is instructive on its clarification as to what is an illegal contract and whether
I an illegal contract can be enforced. At p. 225 (CLJ); p. 633 (MLJ), it was observed:

[22] In *Scott v. Brown, Doering, McNab & Co; Slaughter and May v. Brown, Doering, McNab & Co (1892) 2 QB 724*, at p. 728, Lindley LJ enunciated that no court ought to enforce an illegal contract, even if illegality were not pleaded: A

> … no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well-known judgment of *Lord Mansfield in Holman v. Johnson* (1775) 1 Cowp 341; (1775-1882) All ER Rep 981 B C
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> (the above passage was cited with approval in *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang* and in *Sigma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 per Raja Azlan Shah Ag CJ (Malaya), as HRH then was, delivering the judgment of the court). D

[23] In *Lipton v. Powell* [1921] 2 KB 51, at p. 58, Lush J added that the court may refuse to enforce a contract, which although *ex facie* legal, but where its illegality appears: E

> One of these cases is that in which the contract *ex facie* shows illegality ... In a case of that kind the Court is entitled and indeed bound to intervene and refuse to enforce the contract, because 'No Court ought to enforce an illegal contract … if the illegality is duly brought to the notice of the court'; per Lindley LJ in *Scott v. Brown, Doering, McNab & Co; Slaughter and May v. Brown, Doering, McNab & Co* (1892) 2 QB 724, at p. 728, adopted by Cozens-Hardy MR in *In re Robinson's Settlement* [1912] 1 Ch 717, at p. 725. F
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> *The other case in which the judge may refuse to enforce the contract is that in which, although ex facie the contract is legal, yet in the course of the proceedings an admission is made or evidence is given by which its illegality clearly appears. If, for example, in an action like the present the plaintiff were to admit that he was unregistered, or the defendant were to give evidence that the plaintiff was unregistered, the illegality would be brought to the notice of the court, and the court would refuse to enforce the contract just as if the illegality had appeared upon the face of the contract.* G H
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> (emphasis added)

[18] In *Hasmah Abdul Rahman v. Kenny Chua Kien Lam* [2006] 2 CLJ 1029; [2006] 5 MLJ 236, the respondent sold some of his shares in SBBS to the appellant. The respondent then executed some statutory declarations which declared, among others, that save for the interest which he had disclosed in writing to the Securities Commission, he had no other interest (whether I

A beneficial or otherwise and whether direct or indirect) in SBBS and that he will not appoint a Bumiputera nominee in respect of the equity which he held in SBBS. Later, he brought an action to recover the shares on the ground that he was the beneficial owner of the shares. He alleged that the appellant held it as trustee for his benefit as no payment was made by her. The appellant's B application to strike out the action for illegality under O. 18 r. 19 was dismissed by the High Court. In allowing the appeal, the Court of Appeal observed:

> So too in the instance case where it was not denied that the statutory declarations affirmed by the respondent and the appellant contained assertions which, if juxtaposed with the assertions by the respondent in C the statement of claim, must have been intended at the material time to mislead SC and KLSE to approve the floating of SBBS on the Second Board.
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> Hence, in our view, the sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve D an unlawful end.' There was indeed a deception practised on the relevant approving bodies which were part and parcel of the public administration in this country. Indeed, the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.

E **[19]** What emerges very clearly from the authorities is that where a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end, the transaction is tainted with illegality. It will be unenforceable where a claim is brought in reliance on this illegality. In *Holman v. Johnson* (1775) 1 Cowp 341, at p. 343, 98 ER F 1120, [1775-1802] All ER Rep 98, Lord Mansfield explained the policy underlying the principle that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It G is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's H own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter I would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*

[20] Returning to this case with the benefit of the guidance in of the principles enunciated in the preceding cases, there is a clear admission in the statement of claim and the statements affirmed by the plaintiffs in this action and the first action that the trust was created by HAK by making the defendants shareholders to ensure that the shares were put beyond the reach of his creditors in the event of his bankruptcy. This is a transaction which on the face of it is lawful but was entered into for an unlawful purpose. The plaintiffs admit knowledge about the unlawful purpose and are relying on it to get the assistance of this court to give effect to the wish of the deceased. The court must not allow itself to be used by bankrupts or those facing bankruptcy to avoid the effects or consequences of bankruptcy by transferring their property into the names of close relations in circumstances where, it is apparent that the recipient is a bare trustee.

[21] The case at hand is analogous to *Tinker v. Tinker* [1970] 2 WLR 331. There, a husband conveyed his house to his wife in fear that, if his risky business failed, the creditors would take it as part of his business assets. When he sought to deny that the house belonged to his wife, he failed. As Lord Denning MR explained:

> I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use: and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think it belongs to her.

[22] So too here, the plaintiffs cannot take the position that HAK registered the shares in the defendants' names as bare trustees as he was facing imminent bankruptcy. Based on the principle in *Tinker v. Tinker*, a transaction is either genuine or a sham. It would not make sense if a transaction can be a sham for one purpose but not for another. Hence, the trust created by HAK cannot be genuine as between him and the Official Assignee, whilst at the same a sham as between him and the defendants.

[23] The plaintiffs clearly need to rely on this illegality in making their claim and in so doing ran foul of the principle of public policy that the courts will not lend their aid to plaintiffs whose case is pleaded and is, reliant on illegality. Their case was so pleaded and was so reliant. The plaintiffs were claiming to be entitled to the shares because HAK registered the shares in the defendants' names in fear of his imminent bankruptcy. I therefore would reject Mr Peter Douglas Ling's, submission that this is a case in which the illegality principle was not engaged at all. It clearly was.

[24] The plaintiffs' case is unsustainable for another reason. It will be recalled that the plaintiffs had admitted that HAK has never owned any shares in Sri Magjuta. This argument brings into sharp focus a proposition central to the law of trusts that only a person who owns a property, can create a trust for the benefit of others by appointing a trustee. This is illustrated by the judgment of the Court of Appeal in *See Hong Chen & Sons Sdn Bhd & Ors v. Datuk M Kayveas (Sebagai Pegawai Awam Parti Progresif Penduduk Malaysia Baru PPP)* [2011] 1 LNS 1732; [2012] 2 MLJ 460. It was explained:

> An express trust has been defined to be one:
>
> > Created consciously by the absolute owner of the property either declaring himself to be trustee of the property for identified beneficiaries, or declaring that some other person is to be trustee of the property for identified beneficiaries and then transferring legal title in the trust property to those trustees (see *The Law of Trusts* by Geraint Thomas and Alastair Hudson (2nd Ed), at p. 19).

[25] In *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750; [2006] 1 MLJ 97, the plaintiffs sought a declaration that one Raja Zainal held some shares in trust for them. The said shares were registered in the name of the first defendant company. The High Court allowed the claim. The Court of Appeal reversed the High Court and set aside the declaration on the ground that Raja Zainal was not the owner of the shares and that only an owner of property can declare himself as trustee.

[26] It is clear from the foregoing that HAK was not in position to create a trust in respect of the shares as he was not the owner of the shares.

(b) Damansara house

[27] That takes me to the plaintiffs' claim for the the Damansara house. They alleged that the defendants held the legal title to the Damansara house as bare trustee for them. Their claim was premised on the allegation that HAK had paid RM500,000 and repurchased the house from the defendants in 2012 for their benefit. The statement of claim alleged:

> Paragraph 16:
>
> Pada masa yang sama, defendan pertama dan defendan kedua juga telah meminta CJM untuk suratan hak milik asal sebuah rumah di Damansara Jaya yang dipegang di bawah HS (D) 183963 Lot PT 6817, Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor ("Rumah Damansara Jaya") yang telah dibeli balik oleh HAK daripada defendan pertama dan defendan kedua dengan bayaran RM500,000.00 yang telah dibayar oleh HAK kepada defendan pertama sepanjang beberapa tahun. Suratan hak milik asal Rumah Damansara Jaya tersebut diserahkan oleh defendan pertama kepada HAK dan CJM selepas HAK telah menjelaskan semua bayaran dalam pertengahan tahun 2012.

Paragraph 16.1:

> HAK berniat untuk Rumah Damansara Jaya tersebut dipindah milik kepada plaintif-plaintif masing-masing dan sewa yang diperolehi dari Rumah Damansara Jaya itu diberikan kepada CJM. Namun disebabkan plaintif-plaintif masih muda dan tidak memperolehi pinjaman dari Bank, pindah milik Rumah Damansara Jaya tersebut ditangguhkan.

[28] Mr Justin Voon contended that it was incredible for the plaintiffs to contend that the Damansara house was held on trust by the defendants as HAK was an undischarged bankrupt when the full purchase price was allegedly paid in 2012. In law, a bankrupt cannot purchase a property. It would follow, he argued, that HAK could not have created any trust whilst he was a bankrupt. In the alternative, he argued that if indeed the Damansara house was held on trust, it was incumbent on HAK or the plaintiffs to have registered the trust under the National Land Code. This was not done. The omission undermines the plaintiffs' allegation of trust.

[29] The contention by the defendants that a bankrupt cannot acquire properties is a powerful argument to which there is no real rebuttal. If indeed HAK had purchased the Damansara house from the defendants, he cannot assert ownership over the property as he was a bankrupt at the material time. This effectively demolishes the plaintiffs' claim for the Damansara house.

[30] In addition, the failure to register the trust is another reason why the plaintiffs' claim is bound to fail. In *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115; [1962] MLJ 143, a father brought an action against his son to recover 40 acres of rubber land registered in the latter's name claiming that the son held it as trustee for him. The father had bought the land at a public auction. The father already owned 99 acres of rubber land and if the two holdings were added together his total holding would be 139 acres and would be subjected to the restrictions in the Rubber Regulations (No. 17 1934). In order to avoid these Regulations, the father decided to register the 40 acres in his son's name. Since the transfer, the father received all the income derived from the 40 acres and paid all the wages, assessments and outgoings. The son resisted the claim alleging that he had purchased the land from the father for $7,000 and counterclaimed for an account of profits. The High Court held that the transfer by the father to the son was made for a fraudulent purpose, namely, to deceive the public administration of the country. The Court of Appeal allowed the appeal stating that there was no evidence to support the finding that the plaintiff had practised a deceit on the public administration. The Privy Council allowed the appeal. The judgment of Lord Denning included the following observation:

> The father had also to get over this pertinent question: If he intended the son to take as a trustee why did he not insert on the memorandum of transfer the words as trustee and register the trust as he could have done under section 160 of the Land Code?

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> In these circumstances, it was essential for the father to put forward a convincing explanation why the transfer took the form it did: and the explanation that he gave disclosed that he made the transfer for a fraudulent purpose, namely to deceive the public administration ... once this disclosure was made by the father, the courts were bound to take notice of it, even though the son had not pleaded it.

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[31] It is clear from the foregoing that the plaintiffs' claim that there exists a trust must fail on the ground of illegality.

Ground 2: The Claim Based On Trust Was Void For Uncertainty

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[32] The second ground advanced by the defendants in support of the striking-out application was that, even if there was no illegality, the plaintiffs claim of the existence of a trust was unenforceable as it was unclear as to who were the intended trust beneficiaries. Mr Justin Voon was scathing about what he said was the muddled and confused way the plaintiffs advanced their case on this aspect. He pointed out that the plaintiffs had given three

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different versions in this regard. In para. 9 of affidavit 1, it was alleged that the intended beneficiaries were HAK, CJM, HYC and WCL. However, at para. 12 of the same affidavit, it was alleged the beneficiaries were HAK, HYC and the plaintiffs. Yet again at para. 14, it was alleged that they were HAK, CJM and HYC. In a later affidavit affirmed by the plaintiffs' aunt in

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the first suit, it was alleged that it was for the benefit of HYC and his five sons.

[33] The plaintiffs vigorously disputed that there was any confusion as to the identity of the alleged beneficiaries of the trust. It was clear from the affidavits that it was created for the benefit of the plaintiffs.

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[34] Before I address this point, I think it useful to deal with what are the requirements for a valid trust. The law as expressed in a cluster of cases cited by the defendants is well settled. The plaintiffs did not dispute the legal propositions enunciated therein. The creation of a trust requires the "three certainties": of intention, subject matter and object in order to be completely

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constituted. In the absence of any one of these elements, it becomes an incompletely constituted trust and may not be enforceable. This is borne out by the decisions in *Koperasi Wanita Sarawak Bhd & Anor v. Robert Sim Teck Hock* [2005] 3 CLJ 188; [2005] 4 MLJ 493 (CA) and *Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And Other Appeals* [1994] 3 CLJ 20; [1994]

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2 MLJ 614. In the latter case, the Federal Court held (at p. 624):

> The three essentials of a valid trust are: (a) certainty of words; (b) certainty of subject; and (c) certainty of object. Looking at the seven trust deeds except for that in Civil Appeal No. 5, there is certainty of words and also there is certainty of object, i.e the names of beneficiaries, but

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> there is no certainty of subject, i.e trust property, *viz* the lands, because the beneficial ownership of the lands passed to the purchasers of those subsidiary agreements of sale and purchase in 1969 when the sale of these lands took place, ie, before the trust deeds were executed.

[35] I have examined the competing contentions of parties and have little difficulty in preferring the contention of the defendants that the averments were contradictory, confusing and unclear as to the identity of the trust beneficiaries. It is consequently difficult to ascertain which of these versions given by the plaintiffs represent the truth. There is no explanation for the different versions taken in the affidavits. The different versions taken by the plaintiffs also demonstrate that there is no certainty of objects.

Ground 3: Whether The Plaintiffs Have Locus Standi To Institute This Action

[36] Given the conclusion I have already reached, it is not necessary for me to deal with the remaining grounds for striking out in any detail. I will however do so briefly.

[37] The *locus standi* issue was predicated on the averment made by the second plaintiff in para. 9 of the first affidavit which was in these terms:

> adalah sentiasa niat HAK dan CJM bahawa defendan ketiga akan dikendalikan, diuruskan dan dijalankan untuk manfaat HAK dan CJM serta ibu bapa kami iaitu HYC dan WCL, dan bahawa perniagaan defendan ketiga akan diberikan oleh atau diturunkan dari HAK kepada HYC dan kemudiannya kepada defendan pertama dan saya.

[38] It was the defendants' contention that this amounted to an admission that the trust was created by HAK for the benefit of HYC and therefore he was the proper plaintiff with the requisite *locus* to bring this action. The plaintiffs had no *locus standi* to bring this claim on behalf of their father. In contrast, it was the plaintiffs' contention that as it was HAK's intention that the properties should ultimately go to the plaintiffs, this gave them the requisite *locus.*

[39] It is common ground that HYC is still alive. No explanation is proffered by the plaintiffs as to why he was not added as a party if indeed the allegation in para. 9 of the first affidavit is true. It cannot be gainsaid that the admission made by the plaintiffs in para. 9 is fatal to their case. I therefore accept the submission made by the defendants that the plaintiffs have no *locus* to prosecute this claim.

Ground 4: Whether The Claim Is Barred By Laches

[40] The defendants' last ground is based on laches. It was contended that the plaintiffs had not asserted title to the shares and the Damansara house in the period from which the first defendant became a shareholder and director of Sri Magjuta in 1996 and were not entitled to do so now because of laches. It was said that the fact that the plaintiffs only instituted this action after the commencement of the first action by the defendants for the inspection of the accounts was telling.

[41] The defendants submitted on the other hand, that the defence of laches was misconceived in the light of the Limitation Act 1953. Pursuant to s. 22(1) of the Limitation Act there was no limitation period for a

beneficiary under a trust to commence and action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy or for the recovery of trust property from the trustee. The complaint of delay, it was also argued, was without any merit. The plaintiffs had not filed the present action sooner because the defendants had made no claim to the shares and the Damansara house when HAK was alive. It was only after his death that they asserted ownership over these properties.

[42] The defence of laches essentially consist of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim. In this regard, Sir Barnes Peacock referred to this doctrine in these terms in *Lindsay Petroleum Co v. Hurd* (1874) LR 5 PC 221, 22 WR 492 (at p. 239):

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[43] It is trite that the doctrine of laches only applies to equitable claims, such as restitution, where no period of limitation is provided, the present claim is not an equitable claim but a claim to recover trust property.

[44] In any event, mere delay by itself cannot constitute laches. I find support for my view in the decision in *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202, where Edgar Joseph JR J (as he then was) expressed his judgment in the following terms:

> It is possible to point to a number of cases in which plaintiffs have been successful in spite of spectacular delays. In England, in *Burroughes v. Abbott* [1922] 1 Ch 86, rectification of an instrument was granted after a delay of 12 years; in *Weld v. Petrie* [1929] 1 Ch 33 the Court of Appeal held that a mortgagor's redemption suit was not barred by a delay of 26 years and in *Pickerring v. Lord Stamford* (1795) 30 ER 787, it was held that after a delay of 35 years, a portion of a testator's residuary estate which had been devoted by ten trustees of the testator's will to charity was really held by them on trust for the testator's next of kin. In Australia, a decree of specific performance was granted by the High Court in *Fitzgerald v. Masters* (1956) 95 CLR 420, 26 years after the cause of action arose and in *Bester*

v. Perpetual Trustee & Co Ltd (1970) 33 NSWR 30. Street J rejected a defence of laches where a plaintiff waited 20 years before commencing a suit to rescind a transaction on grounds of undue influence. There are many cases which indicate that mere delay is not a defence in equity. In 1795, in *Pickering v. Lord Stamford* (1795) 30 ER 787 Arden MR inclined to the view that delay in a situation where no statute of limitation applied, could have legal effect only if it amounted to a release implied from conduct or was coupled with detriment to the defendant or a third party.

In *Fitzgerald v. Masters* (1956) 95 CLR 420 equitable relief was granted after an inordinate length of time had elapsed. On the point under discussion, Dixon CJ and Fullager J at p. 443 held that there were no circumstances apart from delay for refusing relief, thereby (and in my opinion, correctly) holding that mere delay of itself cannot constitute laches. In *Fullwood v. Fullwood* (1878) 9 Ch D 176 Fry J held that mere lapse of time affords no bar in equity.

[45] The defendants' contention that the claim should be struck out by reason of laches fails.

Conclusion

[46] I find that the defendants are correct in the position they take that the plaintiffs' claim must fail on the ground of illegality. A plaintiff cannot found his cause of action on an illegal act. Accordingly, I allow the application to strike out the plaintiffs' case with costs of RM5,000 to be paid to the defendants.